IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1434 OF 2004

1. Sadashiv Pandurang Kachare

2. Sanjay Sadashiv Kachare

3. Vishwas Sadashiv Kachare
   all residing at Property No.22396,
   Kachare Galli, Urun Islampur,
   Taluka Walwa,
   District Sangli

4. Smt. Subhadrabai Shankar Pawar
   res. of Rethre Budruk,
   Taluka Karad, District Satara.

5. Shalan Shivajirao Mali,
   resident of house no.2263,
   Kachare Galli, Urun Islampur,
   Taluka Walwa,
   District : Sangli. ..Appellants
   (Original Defendants)

versus

Geetabai Shamrao Pawar,
through Power of Attorney
Vijay Shamrao Pawar,
resident of Rahe,
Taluka Walwa,
District Sangli. ..Respondents
(Original Plaintiff)

Shri Vijay Patil for the Appellants

Shri R.V.More for the Respondent

Coram : S.R.Sathe, J.
Dated : 7th Feb., 2006

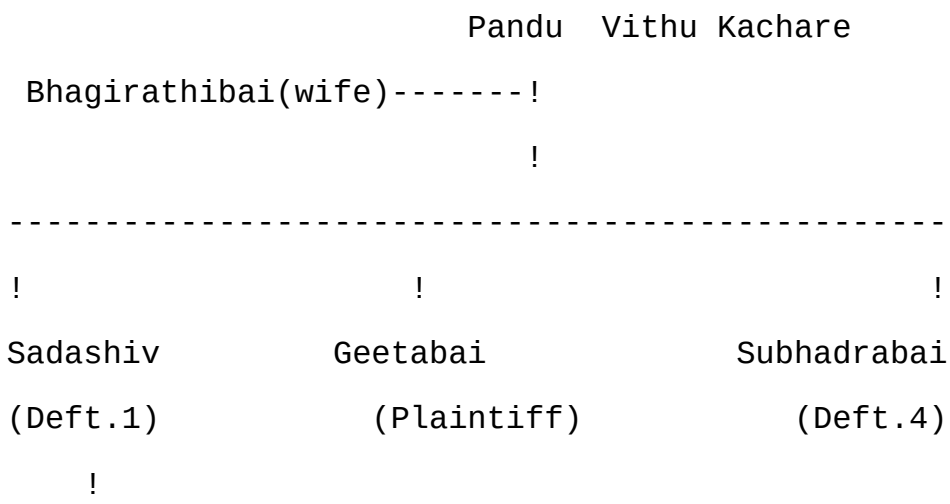
ORAL JUDGMENT.

1. Heard both the learned Advocates at length.

Matter heard finally at admission stage.

2. Appellants, the original defendants in Regular Civil Suit No.367 of 1997 filed in the Court of CJJD Islampur, have preferred this Second Appeal against the judgment and order passed by the Court of First Adhoc Additional District Judge, Islampur, whereby the order dismissing the suit passed by the trial court was set aside and decree for partition and separate possession as prayed was passed in favour of the plaintiff.

3. In order to appreciate the facts giving rise to the present appeal, it would be necessary to see the genealogy showing the relationship between the parties.



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Sanjay Vishwas

(Deft.2) (Deft.4)

Plaintiff Geetabai filed suit for partition as against her brother and his sons Defendants 2 and 3 and sister Defendant No.4 alleging that after the death of her father Pandu Vithu Kachare on 15.3.1951, the name of Defendant No.1, the brother of plaintiff was entered in the record of rights as manager of joint family. The suit property was in the joint possession of the plaintiff and defendant Nos.1 to 4. After the death of plaintiff's mother Bhagirathibai on 23.12,1985, she asked the defendant No.1 to effect the partition of her share in the suit property, but the defendant No.1 refused to do so. On the contrary he sold the land admeasuring about 80.8 sq.mts out of CTS No.526 i.e. the property mentioned as 1C in the plaint to defendant No.5. However, at that time also no share in the purchase price was paid to her. The defendant No.1 also got the names of his sons entered in the record of rights in respect of the suit land described in clause 1A of the plaint. Hence, the plaintiff filed

the suit for partition and claimed her 1/6th share in the suit property.

4. The defendant Nos.1 to 4 filed written statement and opposed the suit claim. They contended that after the death of Pandu Kachare in 1951 the name of Defendant No.1 alone was entered in the record of rights and the City Survey Record. He alone paid the taxes of the properties described in para 1B and 1C of the plaint. He made improvements in the land and the house property and incurred huge expenses for the same. The defendants also contended that the plaintiff had in fact given up her right, title and interest in the suit property after the death of Pandu. Hence, on all these grounds the defendants prayed for dismissal of the suit.

5. In order to prove the suit claim on behalf of the plaintiff, his son Vijay Shamrao Powar was examined at Exhibit 39. As against this, the defendant No.1 examined himself at exhibit 58 and witness Subhadra Kapurkar and Mahesh Bhaitkar. After considering their evidence the trial Court came to the conclusion that as the father of

plaintiff, Pandu Kachare has died on 15.3.1951 i.e. prior to the coming into force Hindu Succession Act, the Plaintiff is not entitled for partition, he, therefore dismissed the plaintiff's suit.

6. Being aggrieved by the said order, the plaintiff filed Civil Appeal No.141 of 2000. After hearing the arguments of both the learned Advocates, the First Appellate Court came to the conclusion that having regard to the provisions of Hindu Women's Right to Property Act, 1937 and then the provisions of Section 14 of Hindu Succession Act, plaintiff is entitled for partition. He, therefore, decreed the suit in plaintiff's favour holding that the plaintiff has 1/6th share in the suit property.

7. The above mentioned order is challenged by the Defendants in the present appeal. By consent the matter is heard finally at admission stage. The substantial question of law involved in this appeal are (i) whether the provisions of Hindu Women's Right to Property Act are applicable to the present case and (ii) Whether provisions of Section 23 of the Hindu Succession Act, 1956 come into play to refuse plaintiff's claim.

8. In this appeal before me Shri Vijay Patil, the learned Advocate for the defendants has urged only three points. Firstly, he submitted that the property in question was ancestral property of Pandu Kachare and as such the plaintiff was not entitled to get any share in the same as Pandu Kachare died on 15.3.1951. Secondly, he canvassed before me that the share determined by the First Appellate Court is not correct. If at all it is held that the plaintiff is having any share in the suit property, it would be 1/12th and not 1/6th. Lastly, as urged, he submitted that the learned First Appellate Court has not taken into consideration the provisions of Section 23 of the Hindu Succession Act, 1956 and has wrongly passed decree for partition in respect of dwelling house. He, therefore, submitted that the appeal be allowed and the suit be dismissed. As against this, Shri R.V.More, learned Advocate for plaintiff supported the judgment and order passed by the First Appellate Court.

8. The relationship between the parties is not in dispute. It is also an admitted fact that Pandu Kachare died on 15.3.1951 leaving behind wife

Bhagirathibai and three children, namely Sadashiv-defendant No.1, Gitabai- plaintiff and Subhadrabai-defendant no.4. It appears that according to defendants the property in question is ancestral property of pandu. However, from the pleadings of the parties as well as from evidence on record it is very clear that there is nothing on record to show that the suit properties are the ancestral properties of Pandu. On the contrary, it appears that both the parties have in fact proceeded on the assumption that the suit property was owned by Pandu and have adduced evidence to that effect.

9. Shri Vijay Patil, learned Advocate for the defendants has drawn my attention to a case **Shamal vs.Amarnath AIR 1970 SC 1643** to show that the Apex Court has held that the provisions of Section 3 of the Hindu Women's Right to Property Act, 1937 do not apply either to the co-parcener property or to the property of Hindu Female. However, it must be noted that there is nothing on record to indicate that the property in question is ancestral property or is property of Hindu Family as contemplated in the above mentioned ruling. On the contrary, as mentioned earlier it appears that the property in

question is the separate property of Pandu Vithu Kachare. Naturally, the provisions of Hindu Women's Right to Property Act, 1937 are applicable. Shri More, learned Advocate for the Plaintiff has in fact drawn my attention to a case **Ashabai Kate vs. Vitthal Nande, Mah. Law Journal, 1990 page 1** wherein in similar circumstances it has been held that the widow of Hindu male who has died before 1956 leaving behind wife and son, wife would get intitially limited interest as per the provisions of Hindu Women's Right to Property Act, 1937 and as per the provisions of Hindu Succession Act she becomes the full owner thereof. So, it is very clear that in the instant case Bhagirathibai got the interest under the Hindu Women's Right to Property Act, 1947 and thereafter under the Hindu Succession Act. So, as she died on 23.12.1985 plaintiff got 1/6th share in the suit property. Even the learned advocate for the defendants could not substantiate the proposition that plaintiff would at the most get 1/12th share.

9. It was tried to be argued on behalf of the defendants that the First Appellate Court has not taken into consideration the provisions of Section

23 of the Hindu Succession Act. It would be worthwhile to see what the section says. It runs as follows :

> **"Special provision respecting dwelling-houses**-Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of Schedule and his or her property includes a dwelling-house, wholly occupied by members of his or heir family, they, notwithstanding anything, contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein, but the female heir shall be entitled to a right of residence therein.
>
> Provided that where such female has a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

Thus, from the above Section it is clear that restriction imposed in this section operates only (1) if the family dwelling house is wholly occupied by the members of the family of the male or female intestate (2) until the male heirs choose to divide their share in it.

10. I have carefully gone through the pleadings of the parties as well as their oral evidence. The

defendants have failed to show that the family dwelling house is wholly occupied by the members of the family of the male or female intestate. Besides this, there is in fact evidence on record to show that defendant No.1 sold some portion of the house property described in clause 1C of the plaint. So, under such circumstances also the restrictions imposed in Section 23 will cease to operate. The first Appellate Court has therefore, rightly, negatived the arguments advanced on behalf of the defendant No.1 in this respect.

11. Thus, from the above discussion it is clear that the order passed by the First Appellate Court is legal and correct. There is no substance in the appeal. Hence, the appeal is dismissed.

. Under the circumstances, of the case parties to bear their own cost.

(S.R.Sathe, J.)